

1996

The State of Utah v. Clarence J. Franklin : Brief of Appellant

Utah Court of Appeals

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Jan Graham, Laura B. Dupaix; attorneys for appellee.

Joan C. Watt, Lisa J. Remal; Salt Lake Legal Defender\'s Assoc.; attorneys for appellant.

Recommended Citation

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
CLARENCE J. FRANKLIN,	:	Case No. 960161-CA
Defendant/Appellant.	:	Priority No. 2

BRIEF OF APPELLANT

Appeal from a judgment of conviction for Aggravated Assault, a third degree felony, in violation of Utah Code Ann. § 76-5-103 (1995), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Leslie A. Lewis, Judge, presiding.

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**UTAH COURT OF APPEALS
BRIEF**

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DOCKET NO. 960161-CA

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IN THE UTAH COURT OF APPEALS

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IN THE UTAH COURT OF APPEALS

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Defendant/Appellant.	:	Priority No. 2

JURISDICTIONAL STATEMENT

This is an appeal by a criminal defendant from the trial court's judgment of conviction entered on March 5, 1996. A copy of that Judgment is contained in Addendum A. The Court of Appeals has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(f) (1996).

**STATEMENT OF THE ISSUE, STANDARD OF REVIEW
AND PRESERVATION OF THE ARGUMENT**

ISSUE. Did the trial judge commit reversible error pursuant to State v. Shondel, 453 P.2d 146 (Utah 1969), in failing to conclude that the lesser crime of Brandishing a Weapon contains the same elements as Aggravated Assault in the context of this case?

STANDARD OF REVIEW. This Court's "review focuses on the trial court's legal conclusions, which [this Court] review[s] under a correction-of-error standard, according no particular deference to the trial court's ruling. [citations omitted]." State v. Vogt, 824 P.2d 455, 456 (Utah App. 1991).

PRESERVATION OF THE ARGUMENT. Defense counsel requested that the trial judge reduce the charge from Aggravated Assault to Threatening With or Using a Dangerous Weapon in Fight or Quarrel. R. 285-288. The trial judge denied the motion. R. 292. Although defense counsel did not reargue this motion at sentencing, the motion was preserved for appellate review since the trial court heard and ruled on it. See State v. Belgard, 830 P.2d 264, 265-66 (Utah 1992) (issues which are raised, heard and resolved in post-trial motion are preserved for appellate review); State v. Matsamas, 808 P.2d 1048, 1053 (Utah 1991) (issue preserved even though not timely raised where judge heard evidence and ruled on motion); State v. Parker, 872 P.2d 1041, 1044 (Utah App. 1994) (issue preserved for appellate review where the trial court acted on the merits of the motion and thus de facto considered it as timely).

TEXT OF DETERMINATIVE STATUTES

Utah Code Ann. § 76-5-102 (1995) provides:

76-5-102. Assault.

(1) Assault is:

- (a) an attempt with unlawful force or violence, to do bodily injury to another;
- (b) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; or
- (c) an act, committed with unlawful force or violence, that causes or creates a substantial risk of bodily injury to another.

(2) Assault is a class B misdemeanor.

Utah Code Ann. § 76-5-103 (1995) provides:

76-5-103. Aggravated Assault.

(1) A person commits aggravated assault if he commits assault as defined in Section 76-5-102 and he:

(a) intentionally causes serious bodily injury to another; or

(b) uses a dangerous weapon as defined in Section 76-1-601 or other means or force likely to produce death or serious bodily injury.

(2) Aggravated assault is a third degree felony.

Utah Code Ann. § 76-10-506 (1995) provides:

76-10-506. Threatening with or using a dangerous weapon in fight or quarrel.

Every person, except those persons described in Section 76-10-503, who, not in necessary self-defense in the presence of two or more persons, draws or exhibits any dangerous weapon in an angry or threatening manner or unlawfully uses the same in any fight or quarrel is guilty of a class A misdemeanor.

STATEMENT OF THE CASE AND NATURE OF THE PROCEEDINGS

In an Information dated February 9, 1995, the State charged Appellant Clarence J. Franklin ("Appellant" or "C.J.") with Aggravated Assault, a third degree felony, in violation of Utah Code Ann. § 76-5-103 (1995). R. 06. The charge was tried to a jury on October 17 and 18, 1995. R. 63-64. The jury convicted Appellant of Aggravated Assault as charged in the Information. R. 106.

On March 4, 1996, the trial court sentenced Appellant. R. 118-19. A copy of the Judgment is in Addendum A. Appellant filed a timely Notice of Appeal on March 11, 1996. R. 120.

STATEMENT OF THE FACTS

State's Version. Two witnesses, David Golder ("David") and Josh Nielson ("Josh") testified for the State during its case-in-chief. Officer Unander testified for the State during rebuttal.

David testified that on February 7, 1995, at about 9:00 p.m., he and Josh, David's good friend of about ten years, emerged from the food court entrance of the Fashion Place Mall. R. 228-29, 243. David's Jeep was parked about seventy feet from the entrance. R. 229. David saw someone going through his Jeep and yelled, "Hey, what are you doing with my Jeep?" R. 230. The person was leaning in the Jeep doing something in the area where the stereo was located. R. 245. The person in the Jeep responded, "We didn't steal it. We didn't steal it. The guys in the blue truck did." R. 230, 264. David had not given the person permission to be in his Jeep. R. 245. The person climbed out of the Jeep when David yelled. R. 246, 263.

David and Josh ran to the Jeep and saw that David's stereo, compact disc player and compact discs were gone. R. 231. David was mad that someone was in his Jeep without his permission. R. 248. Josh testified that David was upset and a little belligerent and used profanity. R. 272. David and Josh started to look through the vehicle which belonged to the person who had been going through the Jeep. R. 232. They saw blankets and coats in the back but did not look further because two people in a blue truck drove up. R. 232.

The blue truck stopped about thirty or thirty-five feet from Golder with the passenger side facing him. R. 232-33. David stopped concentrating on the person who had been in his Jeep, and approached the truck, saying, "Hey, give me my stereo back." R. 234. David testified further that C.J., the passenger, "just blew up and hung out the window and like opened the door a little bit and stepped out with one foot and whipped a gun out and just started yelling and screaming." R. 234. David testified that C.J.'s left hand was hanging out the window with a gun in it. The gun was pointed at David. R. 234-36. David initially thought the gun was a toy. R. 237.

David described the gun as a semiautomatic gun about twelve inches long. R. 235. It was silver/gray and had cooling fins or something on it. R. 236. Josh, who was familiar with guns, described the gun as "a nine millimeter with an air cooler with baffles." R. 268. After David saw the gun, he moved closer and continued to ask that his stereo be returned. R. 237, 255. David approached the truck so that he was right next to the truck and almost touching it. R. 279. The passenger began yelling obscenities. R. 238.

David testified that C.J. pointed the gun at him and stated:

Fuck you, motherfucker. You ain't shit. I will kill you right now. Fuck you motherfucker. You ain't shit.

R. 236, 267. According to David, his friend Josh then took a step towards C.J. and C.J. pointed the gun at Josh "and said that

to him, too." Then he pointed it back at [David]." R. 236.
David could not remember whether he called C.J. a "nigger."
R. 256. He did continue to yell about getting his "stuff" back.
R. 256. Josh testified that C.J. pointed the gun toward David's chest and that the gun was approximately one foot from his chest.
R. 279. C.J. then jumped back, closed the door and told the driver, "let's go." R. 236. David and Josh got the license number as the two drove off, then drove to the police station, where they reported the incident. R. 237.

Officer Unander testified that at about 9:30 p.m. that same night, he went to an apartment complex where he had located the vehicle identified by Josh and David. R. 334. The vehicle was registered to Justin Sparacino's ("Justin") mother. R. 334. Justin arrived while the officer was there and, according to the officer, Justin said to his mother, "How is it going Mrs. Sparacino?" R. 335. The officer told Justin that he knew who he was, and gave him a hard time for calling his mother Mrs. Sparacino. R. 335.

The officer talked with Justin and C.J. According to the officer, C.J. denied being at the Fashion Place Mall that evening. R. 337. The officer searched the blue truck and did not find a gun. R. 341.

The Defense. Justin and C.J. testified for the defense. Justin testified that on the night of February 7, 1995, he went to the mall with C.J. R. 294. Justin was driving his mother's blue truck; C.J. was his passenger. R. 295. He was driving to

find a parking spot when some kid blamed them for taking his car stereo and tried to start a fight with them. R. 297.

Two people called to them and told them to stop. The two approached within about ten feet of Justin's truck. R. 299. One of them was very upset and screaming and calling them names.

R. 300. He called Justin a "spic" and C.J. a "nigger." R. 300. He told them, "Give me my stereo back," and "started cussing at [them] and blaming [them] for stealing his stereo." R. 300. The angry person got within four feet of the truck and stood at a stance as if he were going to hit someone and raised his fists. R. 301, 316. C.J. was at the passenger window and had a pager in his hand. R. 302. The pager was three by one and a half inches with a black colored clip on the back. R. 309. C.J. had a pager so that his sick mother could keep in touch with him. R. 309. The pager had just gone off when this incident occurred. R. 309. When David looked as if he were about to hit, C.J. leaned toward Justin and raised his hand, which was holding the pager, to protect himself. R. 303. At that point, Justin and C.J. drove off. R. 303.

C.J. and Justin went to Justin's apartment and gave the truck keys to his mother. R. 318. They then left with another friend. R. 318. When they returned to the apartment, there were police around the truck. R. 319. The officers questioned C.J. and became rude. One of the officers asked whether C.J. had been at the Fashion Place Mall and C.J. said, "No," meaning that he was not going to say anything else. R. 321.

SUMMARY OF THE ARGUMENT

The variation of Aggravated Assault which was charged in this case and the crime of "Threatening With or Using a Dangerous Weapon in Fight or Quarrel" contain identical elements. Both crimes require the use or drawing of a dangerous weapon. Both crimes require a threat to another while using or exhibiting a dangerous weapon. No additional elements are required for the crime of Aggravated Assault. Because there is no significant difference between the two crimes and the same conduct was required for each crime, the trial judge erred in entering judgment for the crime of Aggravated Assault.

ARGUMENT

POINT. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ENTERING JUDGMENT OF CONVICTION FOR AGGRAVATED ASSAULT WHERE THE CRIME OF BRANDISHING A WEAPON CONTAINS THE SAME ELEMENTS AND IMPOSES A LESSER PENALTY.

The well established rule is that a statute creating a crime should be sufficiently certain that persons of ordinary intelligence who desire to obey the law may know how to conduct themselves in conformity with it. [footnote omitted] A fair and logical concomitant of that rule is that such a penal statute should be similarly clear, specific and understandable as to the penalty imposed for its violation.

Shondel, 453 P.2d at 148; see also Vogt, 824 P.2d at 457.

In State v. Gomez, 722 P.2d 747, 749 (Utah 1986), the Supreme court indicated, "[t]he analytical framework" for evaluating "Shondel" claims.

[T]he criminal laws must be written so that there are significant differences between offenses and

so that the exact same conduct is not subject to different penalties depending on which of two statutory sections a prosecutor chooses to charge. To allow that would be to allow a form of arbitrariness that is foreign to our system of law.

Id. (citing State v. Bryan, 709 P.2d 257, 263 (Utah 1985)).

Where "two statutes proscribe the same behavior, but impose different penalties, the defendant is entitled to the lesser penalty." State v. Duran, 772 P.2d 982, 987 (Utah App. 1989) (citing Shondel, 453 P.2d at 148). The test for determining whether two statutes proscribe identical conduct is whether the two statutes contain the same elements. Gomez, 722 P.2d at 749.

In this case, the State charged Appellant with Aggravated Assault, a third degree felony. Utah Code Ann. § 76-5-103 (1995) outlines the elements for Aggravated Assault.¹ It provides:

(1) A person commits aggravated assault if

¹ This statute was amended effective May 1, 1995. The amendments have no bearing on the issues before this Court. Appellant analyzes the issues pursuant to the version of the statute under which he was charged. The statute as amended provides:

(1) A person commits aggravated assault if he commits assault as defined in Section 76-5-102 and he:

(a) intentionally causes serious bodily injury to another; or

(b) under circumstances not amounting to a violation of Subsection 1(a), uses a dangerous weapon as defined in Section 76-1-601 or another means or force likely to produce death or serious bodily injury.

(2) A violation of Subsection (1)(a) is a second degree felony.

(3) A violation of Subsection (1)(b) is a third degree felony.

Utah Code Ann. § 76-5-103 (Supp. 1996).

he commits assault as defined in Section 76-5-102 and he:

(a) intentionally causes serious bodily injury to another; or

(b) uses a dangerous weapon as defined in Section 76-1-601 or other means or force likely to produce death or serious bodily injury.

(2) Aggravated assault is a third degree felony.

In this case, the State proceeded under subsection (1)(b), claiming that C.J. used a dangerous weapon. R. 06, 91, 286.

Utah Code Ann. § 76-5-102 (1995) outlines the elements for assault. It provides:

(1) Assault is:

(a) an attempt with unlawful force or violence, to do bodily injury to another;

(b) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; or

(c) an act, committed with unlawful force or violence, that causes or creates a substantial risk of bodily injury to another.

The State proceeded under subsection (1)(b) of Section 76-5-102 in this case. R. 286.

The Aggravated Assault charged in this case required the following elements:

1. An intentional threat, accompanied by a show of immediate force or violence, to do bodily injury to another;

2. Use of a dangerous weapon.

See Utah Code Ann. §§ 76-5-102 and 76-5-103 (1995); see also

R. 92.

The crime of Threatening With or Using a Dangerous Weapon

in Fight or Quarrel² is outlined at Utah Code Ann. § 76-10-506 (1995). It states:

Every person, except those persons described in Section 76-10-503,³ who, not in necessary self-defense in the presence of two or more persons, draws or exhibits any dangerous weapon in an angry or threatening manner or unlawfully uses the same in any fight or quarrel is guilty of a class A misdemeanor.

The elements required for Brandishing a Weapon are:

1. (a) the defendant drew or exhibited a dangerous weapon in an angry or threatening manner, or
(b) unlawfully used a dangerous weapon in a fight or quarrel.
2. That the conduct was not in necessary self-defense; and
3. That the conduct was in the presence of two or more persons.

Utah Code Ann. § 76-10-506 (1995); R. 93.

The last two elements listed above necessarily apply to an Aggravated Assault charge as well as a charge of Brandishing a Weapon. Two or more persons, the actor and the person who is threatened, must be present for an Aggravated Assault to occur. Additionally, if the act were in self-defense, the crime of Aggravated Assault would not occur. See Utah Code Ann. § 76-2-402 (1995). The first element for Brandishing a Weapon is also identical to the remaining elements required for Aggravated Assault. Both crimes require drawing or using a weapon. The

² This crime is commonly referred to as "Brandishing a Weapon."

³ Section 76-10-503 refers to persons who are not permitted to purchase or possess dangerous weapons. See Utah Code Ann. § 76-10-503 (1995).

Brandishing a Weapon statute states that the crime occurs where a person "draws or exhibits a dangerous weapon." Utah Code Ann. § 76-10-506 (1995). The relevant section of the Aggravated Assault statute requires that a person "use[] a dangerous weapon." "Use" or "draw or exhibit" are synonymous.

In addition, both crimes require a threat to the other person. As indicated by the official title for the statute as well as its language, Brandishing a Weapon requires "threatening with . . . a dangerous weapon; the statute states "draws or exhibits any dangerous weapon in an angry or threatening manner" The Aggravated Assault statute requires an assault; the assault charged in this case was for "a threat, accompanied by a show of immediate force or violence, to do bodily injury to another." Drawing a dangerous weapon "in an angry or threatening manner" is synonymous with using a dangerous weapon while making a threat. Both statutes therefore require threatening with a dangerous weapon.

No other elements are required for either statute when the variation of Aggravated Assault which was charged in this case is pursued. In this case, there is no significant difference between the two offenses; "the exact same conduct is [] subject to different penalties depending on which of two statutory sections a prosecutor chooses to charge." Gomez, 722 P.2d at 749.

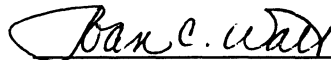
Since the elements of the two statutes are identical in this context, Appellant was entitled to be sentenced under the

statute carrying the lesser penalty. See Shondel, 453 P.2d at 148. The trial judge erred in entering judgment for Aggravated Assault.

CONCLUSION

Defendant/Appellant Clarence J. Franklin respectfully requests that this Court reverse his conviction and remand this case for sentencing on the charge of Threatening With or Using a Dangerous Weapon in Fight or Quarrel, a class A misdemeanor.

SUBMITTED this 18th day of December, 1996.

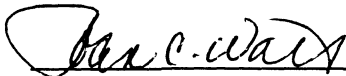


JOAN C. WATT
Attorney for Defendant/Appellant

LISA J. REMAL
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

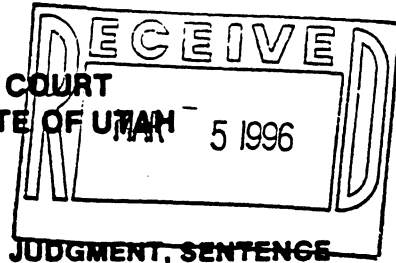
I, JOAN C. WATT, hereby certify that I have caused to be delivered eight copies of the foregoing to the Utah Court of Appeals, 230 South 500 East, Suite 400, Salt Lake City, Utah 84102, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P. O. Box 140854, Salt Lake City, Utah 84114-0854, this 18th day of December, 1996.


JOAN C. WATT

DELIVERED this _____ day of December, 1996.

ADDENDUM A

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH



THE STATE OF UTAH,

Plaintiff,

vs.

CLARENCE J. FRANKLIN

Defendant.

JUDGMENT, SENTENCE
(COMMITMENT)

Case No. 951900571
Count No. _____
Honorable Leslie Lewis
Clerk E. Matheson
Reporter C. Wilson
Bailiff J. Fullmer
Date 3-4-96

☐ The motion of _____ to enter a judgment of conviction for the next lower category of offense and impose sentence accordingly is ☐ granted ☐ denied. There being no legal or other reason why sentence should not be imposed, and defendant having been convicted by ☒ a jury; ☐ the court; ☐ plea of guilty; ☐ plea of no contest; of the offense of Agg. Assault, a felony of the 3rd degree, ☐ a class _____ misdemeanor, being now present in court and ready for sentence and represented by L. Remal, and the State being represented by M. O'Brien, is now adjudged guilty of the above offense, is now sentenced to a term in the Utah State Prison:

☐ to a maximum mandatory term of _____ years and which may be for life;
☒ not to exceed five years;
☐ of not less than one year nor more than fifteen years;
☐ of not less than five years and which may be for life;
☐ not to exceed _____ years;
☒ and ordered to pay a fine in the amount of \$ 5,000.00 +85% surcharge
☒ and ordered to pay restitution in the amount of \$ full to _____

☐ such sentence is to run concurrently with _____
☐ such sentence is to run consecutively with _____
☐ upon motion of ☐ State, ☐ Defense, ☐ Court, Count(s) _____ are hereby dismissed.

☒ Defendant is to pay \$350.00 recoupment to LDA

☒ Defendant is granted a stay of the above (☒ prison) sentence and placed on probation in the custody of this Court and under the supervision of the Chief Agent, Utah State Department of Adult Parole for the period of 3yrs, pursuant to the attached conditions of probation.

☐ Defendant is remanded into the custody of the Sheriff of Salt Lake County ☐ for delivery to the Utah State Prison, Draper, Utah, or ☐ for delivery to the Salt Lake County Jail, where defendant shall be confined and imprisoned in accordance with this Judgment and Commitment.

☐ Commitment shall issue _____

DATED this 4th day of March, 19 96

APPROVED AS TO FORM:

DISTRICT COURT JUDGE

Defense Counsel

Deputy County Attorney

951900571

Judgment/State v. Clarence J. Franklin /CR _____ /Honorable Leslie Lewis**CONDITIONS OF PROBATION**

- ☒ Usual and ordinary conditions required by the Dept. of Adult Probation & Parole.
- ☒ Serve 1 year No credit for time served, no good time credit
in the Salt Lake County Jail commencing forthwith.
- ☒ Pay a fine in the amount of \$ 1000 at a rate to be determined by the Department of Adult Probation and Parole; or ☐ at the rate of +85% surcharge.
- ☒ Pay restitution in the amount of \$ full; or ☐ in an amount to be determined by the Department of Adult Probation and Parole; ☐ at a rate of _____; or ☒ at a rate to be determined by the Department of Adult Probation and Parole.
- ☐ Enter, participate in, and complete any _____ program, counseling, or treatment as directed by the Department of Adult Probation and Parole.
- ☐ Enter, participate in, and complete the _____ program at _____.
- ☐ Participate in and complete any ☐ educational; and/or ☐ vocational training ☐ as directed by the Department of Adult Probation and Parole; or ☐ with _____.
- ☐ Participate in and complete any _____ training ☐ as directed by the Department of Adult Probation and Parole; or ☐ with _____.
- ☒ Submit person, residence, and vehicle to search and seizure for the detection of drugs.
- ☒ Submit to drug testing.
- ☒ Not associate with anyone who illegally uses, sells, or otherwise distributes narcotics or drugs.
- ☒ Not frequent any place where drugs are used, sold, or otherwise distributed illegally.
- ☒ Not use or possess non-prescribed controlled substances.
- ☒ Refrain from the use of alcoholic beverages.
- ☒ Submit to testing for alcohol use.
- ☐ Take antabuse ☐ as directed by the Department of Adult Probation and Parole.
- ☒ Obtain and maintain full-time employment. within 30 days of release from jail.
- ☐ Maintain full-time employment.
- ☐ Obtain and maintain full-time employment or full-time schooling.
- ☐ Maintain full-time employment or obtain and maintain full-time schooling.
- ☒ Defendant is to have no contact nor associate with victims or witnesses in this case.
- ☐ Defendant's probation may be transferred to _____ under the Interstate Compact as approved by the Department of Adult Probation and Parole.
- ☐ Complete _____ hours of community service restitution as directed by the Department of Adult Probation and Parole.
- ☐ Complete _____ hours of community service restitution in lieu of _____ days in jail.
- ☒ Defendant is to commit no crimes.
- ☐ Defendant is ordered to appear before this Court on _____ for a review of this sentence.
- ☒ Defendant is to be placed on ISP probation when released from jail.
- ☒ Defendant is to pay \$350.00 recoupment to LDA
- ☒ Defendant is to enter and complete any counseling deemed appropriate by AP&P
- ☒ Defendant to complete 100 HED
- ☐ _____
- ☐ _____

DATED this _____ day of _____, 19____

DISTRICT COURT JUDGE